

NO. 42850-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RICHARD BANKSTON d/b/a AAROHN CONSTRUCTION

Plaintiffs/Appellants,

v.

PIERCE COUNTY

Defendant/Respondent.

FILED
COURT OF APPEALS
DIVISION II
2012 JUL 23 AM 9:22
STATE OF WASHINGTON
BY
DEPUTY

REPLY BRIEF OF APPELLANT

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ORIGINAL

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A. ARGUMENT IN REPLY

Pierce County was obligated to let the Tree Replacement at Annex Project in accordance with the applicable competitive bidding laws. The statutes and case law pertaining to the competitive bidding laws establish the following criteria for compliance with the competitive bidding laws: 1) the bidding contractor must be listed in applicable small works roster; 2) the contractor performing the contract must be registered and covered by the required construction bond; and 3) once a winning bid is accepted, the terms of the bid cannot be altered. In the instant case, it is undisputed that Aarohn Construction was listed on the small works roster. It is also undisputed that Aarohn Construction was a registered contractor when the bid was submitted, when the contract was awarded, when the contract was signed and when the work on the contract was performed. None of the terms of the bid were altered between the submission of the bid and the awarding of the contract. Consequently, the contract entered into between Aarohn Construction and Pierce County did not violate any of the applicable competitive bidding laws.

Pierce County should also be equitably estopped from now arguing that the contract between it and Aarohn Construction was illegal and therefore void when it recovered money from the surety bond issued to Aarohn Construction for the very same contract. Because the contract

between Aarohn Construction and Pierce county is valid and enforceable (and has already been enforced by Pierce County), the trial Court's order granting Pierce County's Motion for Summary Judgment should be reversed and the case should be remanded for trial.

1. There was a valid contract between Pierce County and Aarohn Construction.

Pierce's County's argument that it did not enter into a valid contract with Aarohn Construction is without merit. The contract on its face states that it is made and entered into by and between Pierce County and Aarohn Construction. The address listed on the contract is 1306 97th St E., Tacoma, WA 98455. This is the address listed on Aarohn Construction's license as registered by Richard Bankston. App. A. The contract entered into between Pierce County and Aarohn Construction clearly shows that the owner of business is R J Bankston. App. B. Richard Bankston is a party to the contract between Pierce County and Aarohn Construction and has a cause of action for breach of contract.

Pierce County's main argument seems to be that there were two different Aarohn Constructions involved in this case. The only support for the fact that there were two different Aarohn Constructions involved in this case is that the company registered by John Bankston had a different UBI number than the company as registered by Richard Bankston. This is

a function of the change in ownership, and not a change in the business itself.¹ In Washington, the UBI number stays with the owner and not with the firm name/trade name.²

2. The contract between Aarohn Construction and Pierce County did not violate any competitive bidding laws.

Pierce County's argument that a contract that violates a statute or municipal ordinance is illegal and unenforceable is misplaced. First, Pierce County has not stated how its contract with Aarohn Construction is illegal. To support its contention, Pierce County recites Pierce County Code Section 2.106.035 which requires all public works construction projects with values exceeding \$25,000.00 to be competitively bid. It is undisputed that the Tree Replacement Project at Annex was competitively bid. Pierce County also cites PCC 2.106.060(A)(4) which provides that "[i]n the case of public works purchases from \$10,000 to \$200,000 the procedures of RCW 39.04.155 for small works contracts awards process *may* be used." The term "may" in a statute has a permissive or discretionary meaning. *Humphrey Industries, Ltd. v. Clay Street Assoc., LLC.*, 170 Wn.2d 495, 511-512, 242 P.3d 846 (2010). The permissive nature of RCW 39.04.155 is also included in the Pierce County Purchasing Guidelines. CP 103-104 The Purchasing Guidelines state in part: "D.

¹ <http://www.irs.gov/businesses/small/article/0,,id=98011,00.html>

² <http://dor.wa.gov/Docs/Pubs/UBI/UBImanualComplete.pdf>

\$10,000 up to \$200,000 – The Small Works Roster process *may* be used.”
(emphasis added) CP 104.

Second, even if the requirements of RCW 39.04.155 are deemed mandatory, the statute at the time the Annex Tree Replacement Project was awarded provided that, “[p]rocedures shall be established for securing telephone, written, or electronic quotations from contractors on the appropriate small works roster to assure that a competitive price is established and to award contracts to the lowest responsible bidder, as defined in RCW 43.19.1911.” Aarohn Construction was listed on the small works roster, Aarohn Construction submitted the lowest bid, and the contract was awarded to the lowest responsible bidder. This is confirmed by the timeline submitted by Pierce County in the Response Brief.

3. The contract between Pierce County and Aarohn Construction was not illegal or void.

Pierce County contends that its contract with Aarohn Construction was illegal and therefore void because the contract was signed by Aarohn Construction as registered by Richard Bankston. The cases cited by Pierce County regarding the illegality of contracts when a public entity negotiates with bidders following bid opening and before a contract is awarded are not germane to this case. First, Pierce County did not negotiate with Aarohn Construction in the time between its request for bids and the

awarding of the contract. None of the terms of Aarohn Construction's bid changed. Second, assuming *arguendo* that the contract between Pierce County and Aarohn Construction violated an ordinance, that does not automatically render the contract void and unenforceable. Where the agreement is neither immoral nor criminal in nature and the statute or ordinance subjects violators merely to a penalty without more, the contract is not automatically void. *Sienkiewicz v. Smith*, 97 Wn.2d 711, 716-717, 649 P.2d 112 (1982). Pierce County has not identified any code provision or statute that was violated by its contract with Aarohn Construction. The contract was not immoral or criminal in nature. As a result, the contract between Aarohn Construction and Pierce County is not void.

Furthermore, whether a contract is void based on an illegal agreement is a question of fact that cannot be determined without a trial on the merits. *Golberg v. Sanglier*, 97 Wn.2d 874, 639 SP.2d 1347 (1982); *Hammack v. Hammack*, 114 Wn. App. 805, 60 P.3d 663 (2003). To the extent the trial court granted Pierce County's motion for summary judgment because it found the contract between Pierce County and Aarohn Construction was void or illegal, such a determination was improperly made as a matter of law. RP (October 28, 2011) at 11.

4. At all relevant times, Aarohn Construction was in substantial compliance with RCW 18.27.

When a contractor substantially complies with RCW 18.27, the contractor is not barred from suit. *Lobak Partitions, Inc. v. Atlas Construction Co., Inc.*, 50 Wn. App. 493, 749 P.2d 716 (1988); *Murphy v. Campbell*, 79 Wn.2d 417, 421, 486 P.2d 1080 (1971). Evidence of substantial compliance renders summary judgment improper. *Lobak Partitions, Inc.*, 50 Wn. App. at 503. A contractor need not demonstrate literal compliance with the requirements of RCW 18.27 in order to maintain an action. Substantial compliance is sufficient so long as the compliance satisfies the legislative purpose behind the registration act to protect the public against unreliable, fraudulent, and incompetent contractors. *Northwest Cascade Constr. Inc. v. Custom Component Structures, Inc.*, 83 Wn.2d 453, 460, 519 P.2d 1 (1974). The legislative purpose underlying RCW 18.27 is satisfied when the contractor seeking to maintain an action has met the bonding and insurance requirements of RCW 18.27, those indicia of minimal financial responsibility required by the statutory enactment to protect the general public against the unreliable, fraudulent or incompetent contractor. *Murphy v. Campbell*, 79 Wn.2d at 422. Pierce County cannot argue that Aarohn Construction was not in

substantial compliance with RCW 18.27 because Pierce County was paid under the surety bond issued to Aarohn Construction.

5. Pierce County should be estopped from arguing that its contract with Aarohn Construction is void.

The defense of equitable estoppel was raised in the court below. Issue number 5 pertaining to the assignments of error identified by the Plaintiff is identical to the issue briefed in response to Pierce County's Motion for Summary Judgment. CP 114. Equitable estoppel prevents a party from taking a position inconsistent with a previous one where inequitable consequences would result to a party who has justifiably and in good faith relied. *Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993); *Wilson v. Westinghouse Elec. Corp.*, 85 Wn.2d 78, 81, 530 P.2d 298 (1975). When equitable estoppel is asserted against the government, the party asserting estoppel must establish five elements by clear, cogent, and convincing evidence: (1) a statement, admission, or act by the party to be estopped, which is inconsistent with its later claims; (2) the asserting party acted in reliance upon the statement or action; (3) injury would result to the asserting party if the other party were allowed to repudiate its prior statement or action; (4) estoppel is necessary to prevent a manifest injustice; and (5) estoppel will not impair governmental functions. *Kramarevcky*, 122 Wn.2d at 743;

Silverstreak, Inc. v. Dep't of Labor & Indus., 159 Wn.2d 868, 887, 154 P.3d 891 (2007).

All of the elements of equitable estoppel are present in this case. Pierce County's current position that its contract with Aarohn Construction is void *ab initio* is inconsistent with its claim that it was entitled to payment under the surety bond issued to Aarohn Construction after Pierce County wrongfully terminated Aarohn Construction from the tree replacement project. Aarohn Construction reasonably and justifiably relied on the contract when it performed under the contract. Injury will result to Aarohn Construction if Pierce County maintains its position that its contract with Aarohn Construction was void. Estoppel is necessary to prevent manifest injustice. Pierce County has received payment under the very contract that it claims was illegal and void, and it would be manifestly unjust for Pierce County to receive payment under the contract and then argue that the contract never existed. At the very least, if the contract was void *ab initio*, Aarohn Construction should be reimbursed for the payment Pierce County accepted under the contract. If the doctrine of equitable estoppel is invoked, no governmental function would be impaired.

Pierce County implies that equitable estoppel cannot be invoked by either John or Richard Bankston because they do not have clean hands.

Neither John nor Richard Bankston engaged in any fraudulent activities or made any misrepresentations that would prevent them from having clean hands. *Mutual of Enumclaw Ins. Co. v. Cox*, 110 Wn.2d 643, 757 P.2d 499 (1988)(a person may not base a claim of estoppel based on fraudulent misrepresentations). In the instant case, Aarohn Construction did not make any fraudulent misrepresentations to Pierce County or engage in any conduct that would preclude the availability of an equitable estoppel defense.

6. Pierce County is not entitled to attorney fees under RAP 18.1 or RAP 18.9.

The applicable law in this case does not grant Pierce County the right to recover attorney fees or expenses under RAP 18.1. Pierce County next contends that it is entitled to attorney fees and expenses pursuant to RAP 18.9 based on the appeal being frivolous. For purposes of RAP 18.9(a) an appellate court may sanction an appellant for filing a frivolous appeal by awarding attorney fees to the opposing party if, considering the record as a whole, the court is convinced that the appeal: 1) does not present any debatable issues upon which reasonable minds might differ; and 2) is so devoid of merit that there is no possibility of reversal. Any doubt regarding whether an appeal is frivolous is resolved in favor of the

appellant. *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 255, 241, 119 P.3d 325 (2005).


A civil appellant has a right to appeal under RAP 2.2. An appeal that is affirmed simply because the arguments are rejected is not frivolous. *Streater v. White*, 26 Wn. App. 430, 434-435, 613 P.2d 187 (1980). All of appellants' arguments raise debatable issues upon which reasonable minds might differ. Raising at least one debatable issue precludes finding that the appeal as a whole is frivolous. *Id.* Pierce County is not entitled to attorney fees and expenses under RAP 18.9.

B. CONCLUSION

For the foregoing reasons, and the reasons set forth in the opening brief, Plaintiff requests this court to grant the appeal and reverse the trial court's order granting Pierce County's Motion for Summary Judgment.

DATED this 20th day of July, 2012.

Respectfully submitted,

By 

David B. Jensen, WSBA #21284

Sylvia J. Hall, WSBA #38963

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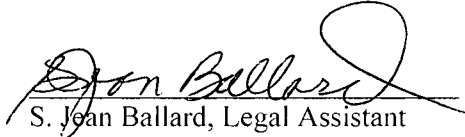
Seattle, WA 98121


Attorneys for Appellant Richard Bankston,
d/b/a Aarohn Construction

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 2012, I caused a true and correct copy of the foregoing to be delivered to all counsel of record as indicated below:

Mr. John F. Salmon Pierce County Prosecuting Attorney/ Civil Division 955 Tacoma Ave. S, Suite 301 Tacoma, WA 98402-2160 jsalmon@co.pierce.wa.us	<input checked="" type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via e-mail
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S. Jean Ballard, Legal Assistant

FILED
COURT OF APPEALS
DIVISION II
2012 JUL 23 AM 9:22
STATE OF WASHINGTON
BY  DEPUTY

APPENDIX

Contract

RJ License

COUNTY OF PIERCE
PUBLIC WORKS CONTRACT

Project: Tree Replacement Project at Annex

Agency: Facilities Management

THIS CONTRACT, made and entered into by and between

Pierce County
615 S 9th St Ste 100
Tacoma WA 98405-4674

hereinafter referred to as the owner, and

Aarohn Construction
1306 97th St E
Tacoma WA 98445

hereinafter referred to as the Contractor shall be the agreed basis of performing the work identified herein.

FIRST: The Contractor agrees to furnish all material, labor, tools, equipment, apparatus, facilities, etc. necessary to perform and complete in a workmanship like manner the work called for in the contract documents entitled:

Tree Replacement Project at Annex, Small Works RFQ No. 06-SW13

prepared by:

Pierce County Purchasing
according to the terms of such contract documents which documents are incorporated herein by reference. The contract documents shall include, but shall not be limited to, the accepted Proposal, General and Special Conditions, Specifications, Drawings, Addenda, Bond, Small Works Quotation, and this Contract.

SECOND: Time for Completion: The work to be performed under this contract shall commence as soon as the Contractor has been officially notified to proceed by the Facilities Management Department and shall be completed within 90 calendar days of receipt of Notice to Proceed.

THIRD: In consideration of the Contracts, herein contained on the part of the Contractor, the Owner hereby agrees to pay the Contractor for said work completed according to the Contract Documents, the sum of one hundred thirty-two thousand five hundred eighty-seven and no/100 dollars (\$132,587.00), plus State Sales Tax and consisting of the following:

Basic Bid	\$ 105,587.00
Alternate Bid No. 1	9,500.00
Alternate Bid No. 2	17,500.00

PROGRESS PAYMENTS shall be made, not more often than monthly, on amounts earned by the Contractor and certified by the Contract Manager/Project Coordinator. Five percent (5%) retainage shall be held for forty-five days following final acceptance by County or until receipt of all necessary releases and settlement of any liens, whichever is later.

This contract shall be construed and governed by the laws and statutes of the State of Washington.

**PIERCE COUNTY
CONTRACT SIGNATURE PAGE**

Contract # 52811

IN WITNESS WHEREOF, the parties have executed this Agreement this ____ day of _____, 20__.

CONTRACTOR:

Contractor Signature

Date

Title

UBI No. (required): 602 607 493

Contractor's License: AB00H094735

Name: Arden Corp

Address: 1306 97th St E

Tacoma WA 98445

Mailing
Address:

Contact Name: Tina Barker

Phone: 253-537-2487

Fax: 253-722-5815

PIERCE COUNTY:

Approved as to legal form only:

Prosecuting Attorney

Date

Recommended:

Budget and Finance

Date

Approved:

Department Director
(less than \$250,000)

County Executive (over \$250,000)

Date

CONTRACTOR-

Complete the tax status information for one of the following business entity types. Individual or Corporate name must exactly match that which is registered with either Social Security Administration or Internal Revenue Service.

SOLE PROPRIETOR:

Business Owner's Name

DBA/Business or Trade Name (if applicable)

538-72-7293

Business Owner's Social Security Number

PARTNERSHIP:

Name of Partnership

Partnership's Employer Identification Number

CORPORATION:

Name of Corporation

Corporation's Employer Identification Number

Return to List > Start a New Search > Printer friendly

General/Specialty Contractor

A business registered as a construction contractor with L&I to perform construction work within the scope of its specialty. A General or Specialty construction Contractor must maintain a surety bond or assignment of account and carry general liability insurance.

Business and Licensing Information

Verify Workers' Comp Premium Status		Check for Dept. of Revenue Account	
Name	AAROHN CONSTRUCTION	UBI No.	602607493
Phone No.	(253) 537-2487	Status	EXPIRED
Address	1306 97TH ST	License No.	AAROHC*947J5
Suite/Apt.		License Type	CONSTRUCTION CONTRACTOR
City	TACOMA	Effective Date	4/25/2006
State	WA	Expiration Date	4/25/2008
Zip	98445	Suspend Date	1/26/2008
County	PIERCE	Previous License	
Business Type	INDIVIDUAL	Next License	
Parent Company		Associated License	
		Specialty 1	GENERAL
		Specialty 2	UNUSED

Business Owner Information Hide All

Name	Role	Effective Date	Expiration Date
BANKSTON, RICK J	OWNER	04/25/2006	

Bond Information

Bond	Bond Company Name	Bond Account Number	Effective Date	Expiration Date	Cancel Date	Impaired Date	Bond Amount	Received Date
2	WESTERN SURETY CO	14919960	12/04/2006	Until Cancelled	01/26/2008		\$12,000.00	12/04/2006
1	DEVELOPERS SURETY & INDEM CO	741605C	04/24/2006	Until Cancelled	10/20/2006		\$12,000.00	04/25/2006